

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

77-2054

To be argued by :

L. KEVIN SHERIDAN

B
A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRUZ PADRO MARTINEZ,

Plaintiff-Appellant,

-against-



BENJAMIN MALCOLM, Individually and as Commissioner
of Correction of the City of New York, PETER M.
SCHAEFER, individually and as Warden of the Manhattan
House of Detention for Men, JAMES GORMAN, individually,
and as Captain of the New York County Court Detention Pen,

Defendants-Appellees,

DR. "JOHN SANTOS", DR. "R. DANIELS", CAPT. "JOHN" KING,
individually and in his capacity as Correction Officer
of the City of New York, A. TURNER, DAVID WHITE, JOHN DOE
NO. 1, Shield No. 1363, JOHN DOE NO. 2, Shield No. 1813,
JOHN DOE NO. 3, Shield No. 830, JOHN DOE NO. 4, Shield
No. 2151, JOHN DOE NO. 5, Shield No. 250, JOHN DOE NO. 6,
Shield No. 170, JOHN DOE NO. 7, Shield No. 1694, JOHN DOE
No. 8, Shield No. 1679, JOHN DOE NO. 9, Shield No. 276,
JOHN DOE NO. 10, Shield No. 1701, JOHN DOE NO. 11, Shield
No. 2067, individually and as Correction Officers of the
City of New York,

Defendants.

On appeal from the United States District Court for the
Southern District of New York.

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Defendants.

APPELLEES' BRIEF

Preliminary Statement

In his action brought pursuant to 42 U.S.C.
§1983, the plaintiff appeals from (1) a judgment of the
United States District Court for the Southern District

of New York (BONSAL,J.), entered March 11, 1977, which, following a jury verdict in favor of the remaining defendants, Messers. Malcolm, Schaeffer and Gorman, officials in the New York City Department of Corrections, granted judgment in favor of said defendants dismissing the complaint and (2) an order of that same court, entered April 14, 1977, denying plaintiff's motion for judgment notwithstanding the verdict*(29).

As limited by his brief filed on this appeal (see Appellant's Brief, p. 3, footnote, and p. 8) plaintiff's only remaining claim is against the defendant James Gorman, a Captain in the uniformed service of the New York City Department of Correction, who, plaintiff claims in his brief (p.5), was "on the scene and in charge" when, on July 26, 1973, plaintiff, then a detainee at the Manhattan Court

Detention Pens, was allegedly assaulted by a number of Correction Officers.

In his brief the plaintiff argues that there was sufficient evidence for the jury to find that Captain Gorman was responsible for excessive force being used

*Numbers in parentheses , unless otherwise indicated, refer to the pages of the Appendix prepared and filed by the plaintiff-appellant.

against him (POINT III) and that the District Court should have directed the jury to return a separate general verdict as to each defendant (POINT I) and or should have submitted interrogatories to the jury (POINT II). However, despite the obvious need for a full record when arguments such as these are tendered, and despite the direction of this Court that a joint appendix be filed on this appeal, * plaintiff's counsel has "perfected" this appeal without either consulting this defendant's counsel concerning the contents of the appendix or ordering the minutes of this trial. And, indeed, even the transcript of the Court's charge to the jury has not been filed with the Court.

Under these circumstances, we argue, first, that this appeal should be dismissed for plaintiff's failure (1) to comply with the Court's order insofar as it called for a joint appendix and (2) to provide any appendix sufficient to allow intelligent review of the

*See Scheduling Order dated August 16, 1977

issues tendered.* In this connection we note that this Court has already denied plaintiff's application for an order directing that the minutes of trial be provided to him at the expense of the United States. We also urge that even under plaintiff's version of the testimony adduced at trial the evidence was insufficient to make out a prima facie case against the defendant Gorman under §1983.

*Initially we intended to move to dismiss the appeal on these grounds, but we were informed that such a motion would be made returnable before the panel hearing this appeal. Accordingly, we decided that our argument for dismissal should be presented in our brief on the appeal.

FACTS

At pages 4 to 6 of his brief plaintiff presents a summary of what he claims was the testimony concerning the defendant Gorman's involvement in the July 26, 1973 incident, during which he claims excessive force was used to subdue him. Gorman's only involvement is described as follows (id., pp. 4-5):

"Capt. Gorman arrived on the scene when Plaintiff had been cuffed. He ordered the transfer to Part 31 [another Court part]. Plaintiff was eventually taken to the prison hospital on Rikers Island. Gorman testified that he gave the orders, and that Plaintiff was dragged to the van. Gorman also stated that he saw bruises on Plaintiff's eye or on the side of his face."

Plaintiff also claims he was beaten after he was taken to Part 31, but other than claiming, most vaguely, that Gorman's testimony places him "on the scene and in charge" (id. p. 5), he does not claim that Gorman ordered or was even present at the scene of the subsequent beating.

ARGUMENT

POINT I

THIS APPEAL SHOULD BE DISMISSED
FOR FAILURE OF PLAINTIFF TO COMPLY
WITH THIS COURT'S ORDER THAT A
JOINT APPENDIX BE FILED AND, MORE
FUNDAMENTALLY, FOR HIS FAILURE TO
PRESENT A RECORD SUITABLE FOR
INTELLIGENT REVIEW

In all of the scheduling orders entered in this case by this Court it was specifically ordered that a joint appendix be filed. Such an order necessarily implies that counsel for the appellee should be consulted as to the contents of the appendix. This was not done in this case. Had this been done, we would have insisted that the transcript of trial, which to our knowledge has never even been ordered by plaintiff's counsel, be either included in the appendix or at least filed with this Court. Instead, plaintiff, in defiance of this Court's order, has attempted to perfect his appeal on an altogether insufficient record. Under these circumstances, we submit that his appeal should be dismissed.

POINT II

IF THE APPEAL IS NOT TO BE DISMISSED,
THE JUDGMENT AND ORDER APPEALED FROM
SHOULD BE AFFIRMED.

Plaintiff's failure to present to this Court a record suitable for review mandates, we believe, dismissal of this appeal. However, even on the "facts" as described in plaintiff's brief, there is no basis presented for a finding of liability against the defendant Gorman. There is no indication in plaintiff's statement of facts (but, see, Appellant's Brief, p. 13), that he was ever present when plaintiff claims he was beaten, or that he was in any other way responsible for plaintiff's injuries. To the extent that plaintiff may be arguing inadequate training of correction officers (see Appellant's Brief, p. 5), there is no indication that Captain Gorman had any responsibility for their training, nor do we believe mere negligence in this regard would constitute a sufficient basis for liability under §1983.

Plaintiff's statement at page 13 of his brief that Gorman was "present when ten or eleven correction officers beat Plaintiff" is simply inconsistent with his earlier statement that plaintiff had already been handcuffed when Gorman arrived on the scene (id., pp. 4-5). In short, not only is plaintiff's version of the relevant testimony undocumented, but it is also both inconsistent and incredible. If this appeal

is not to be dismissed, the judgment and order appealed from should in any event be affirmed.

CONCLUSION

The appeal should be dismissed. Failing dismissal of the appeal, there should be an affirmance.

October 19, 1977

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants-Appellants

L. KEVIN SHERIDAN,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Raymond Escutel being duly sworn, says that on the 19 day
of Oct 19 77, he served the annexed BRIEF upon
E. P. GAUTIER Esq., the attorney for the PLAINTIFF
3 COPIES
herein by depositing ~~a copy~~ of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and
Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the
United States in said city directed to the said attorney at No. 579 Courtland Ave in the
Borough of BRX, City of New York, being the address within the State theretofore designated by
him for that pur

Sworn to before me

19 day of Oct 19 77

Raymond Escutel

Bruce S. Garner

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

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